Supreme Court, U.S.
FILED
MAY 24 2000
CLERK

No. 99-1594

In The

Supreme Court of the United States

JAMES BUTTS, et al.,

Petitioners,

v.

JAMES McNALLY and JAMES JOHNSON BEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

CHARLES D. WEISSELBERG
CENTER FOR CLINICAL EDUCATION
University of California
School of Law (Boalt Hall)
Berkeley, CA 94720-7200
(510) 643-8159

SAMUEL R. GROSS
UNIVERSITY OF MICHIGAN LAW SCHOOL
965 Legal Research Bldg.
Ann Arbor, MI 48109
(734) 764-1519

MARK D. ROSENBAUM
Counsel of Record
DANIEL P. TOKAJI
MICHAEL SMALL
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500

STEVEN R. SHAPIRO
ACLU FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether police officers may escape a federal civil rights trial for coercing inculpatory statements from suspects in custody, where the statements were actually used by prosecutors, where the state courts have already found constitutional violations, and where the district court has found sufficient evidence of actual coercion to warrant a trial.

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INTRODUCTORY STATEMENT

Respondents James McNally and James Johnson Bey brought this action to redress abusive and coercive police misconduct. During in-custody interrogations, police officers extracted incriminating statements from both McNally and Bey, with the intent of using those statements against them at trial. State courts have already determined that both statements were involuntary.

As one element of their proof of coercion in this civil rights case, respondents introduced evidence that police officers deliberately interrogated them "outside *Miranda*" – specifically, that the officers, after administering the warnings required by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), intentionally refused to honor the respondents' repeated requests to remain silent and to have counsel present. Respondents McNally and Bey produced evidence that this misconduct was not inadvertent but, rather, was undertaken pursuant to municipal policies by which officers were affirmatively trained to disregard suspects' invocation of their *Miranda* rights, in order to obtain incriminating statements for use at trial. These policies form the basis of respondents' claims under *Monell v. Dept. of Social Services of City of New York*, 429 U.S. 1071 (1977) against the cities of Los Angeles and Santa Monica, asserting that these municipalities encouraged their officers to use coercive interrogation tactics upon citizens not charged with any criminal offenses.

In addition, the officers employed a variety of coercive tactics including false promises, profanity, disparaging comments about counsel, suggestions of harsher punishment and physically threatening gestures. For example, after being advised of his *Miranda* rights, respondent McNally requested to see an attorney not less than four

times. On each occasion, police denied him counsel; he was told instead by petitioner Talbot, "Okay, and fuck your attorney. It's just – I don't care about him anymore . . . [a]s far as I'm concerned, you know, [attorneys] really mess up the system." The officers then falsely promised McNally that because he had asserted his rights, it was entirely safe for him to speak. McNally gave a statement after he was subjected to these coercive tactics.

Contrary to the representations of petitioners and their *amici*, then, this case is not about whether police officers may be subjected to liability simply for failing to comply with the dictates of *Miranda*. As the district court and the court of appeals both recognized, respondents have come forward with evidence of actual coercion under the Fifth Amendment, and not merely conduct that is presumptively coercive under *Miranda* and its progeny. Both lower courts determined that respondents' claims involve disputed issues of fact, not law, and that the respondents have put forth sufficient evidence to entitle them to a trial. The district court ruled that "there is a genuine issue of material fact as to whether or not Plaintiffs McNally and Bey were coerced into speaking by police officers during custodial interrogation, in violation of Plaintiffs' Fifth Amendment right against self-incrimination." Pet. App. B2. The court of appeals affirmed, holding that:

> [C]oercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment. The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and that

> the state appellate court expressly concluded that Bey's statement was coerced.

Pet. App. A17 (footnote omitted).

Neither the district court nor the court of appeals held that a violation of *Miranda*, in and of itself, gives rise to a civil rights action under 42 U.S.C. §1983. The lower courts simply held that the officers' conduct in this case – through which they extracted statements that officers intended to be used and that were in fact later used in court – established a genuine issue of material fact as to actual coercion. Petitioners and their *amici* are therefore incorrect in asserting that the lower court decisions establish a constitutional right of action for violation of *Miranda* alone. *See* Pet. i, 15, 24-25. Whether or not the deliberate failure to abide by *Miranda* suffices to give rise to a federal civil rights claim, though perhaps an interesting issue, is not the issue in this case. The issue presented here is simply whether the petitioner officers may escape liability, and receive qualified immunity, where there is a triable issue as to whether they intentionally subjected respondents to unconstitutional coercion. To be sure, the officers' use of *Miranda* as a sword rather than a shield constitutes a part of respondents' proof of coercion; it is by no means, however, their only proof.

Accordingly, petitioners are wrong to argue that this case raises the question whether violation of *Miranda* gives rise to a constitutional claim. The real question is whether intentional refusal to adhere to its strictures may constitute any part of plaintiffs' evidence in support of their claim of illegal coercion. As this issue has already been resolved by this Court, and there is no conflict among the lower courts, this case presents no issues worthy of review.

STATEMENT OF THE CASE

The respondents brought their lawsuit against the individual officers who questioned them, the Chief of the Santa Monica Police Department, and the Cities of Santa Monica and Los Angeles.[1] Respondents McNally and Bey's complaint asserted three claims against petitioners: that the officers coerced statements from them, in violation of the Fifth Amendment; that the officers forced them to give involuntary statements, in violation of the Fourteenth Amendment; and that the officers' conduct shocks the conscience, also in violation of the Fourteenth Amendment. The district court denied the petitioners' motions to dismiss on the basis of qualified immunity and held that the complaint indeed stated claims. *See California Attorneys for Criminal Justice ("CACJ") v. Butts*, 922 F. Supp. 327, 334-38 (C.D. Cal. 1996). On summary judgment, the district court reaffirmed its earlier denial of qualified immunity (*see* Pet. App. B5-B6), but dismissed the Fourteenth Amendment claims. *See* Pet. App. B4-B5, C7. The court granted the petitioners' motions for summary judgment on the Fourteenth Amendment "involuntariness" claim, finding that it was entirely subsumed in the Fifth Amendment claim and thus subject to dismissal under *Albright v. Oliver*, 510 U.S. 266 (1994). Pet. App.

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[1] California Attorneys for Criminal Justice and the Criminal Courts Bar Association, two bar associations, also sought injunctive relief. The district court dismissed their claims for lack of standing. The district court also dismissed the causes of action against the Chief of the Los Angeles Police Department and law enforcement trainer Devallis Rutledge. These dismissal orders are not before this Court on this interlocutory appeal.

C7.[2] The court denied summary judgment on the respondents' Fifth Amendment claim, determining that "[t]he Fifth [A]mendment claim . . . is appropriate for resolution before a jury, on a fully developed record." Pet. App. B4. The court of appeals affirmed the denial of summary judgment, appropriately noting that review of unresolved issues of fact is inappropriate on an interlocutory appeal. Pet. App. A18, A24.

In allowing the Fifth Amendment claim to proceed to trial, the district court emphasized that the respondents have produced evidence of actual coercion, and not merely conduct that is presumptively coercive under *Miranda*. *See* Pet. App. B3 ("a mere violation of *Miranda* is not, without more, a violation of the Fifth Amendment"). As set forth in the district court's summary of the facts:

> [T]he detectives purposely continued to question Plaintiffs after they had invoked their rights to silence and to counsel under *Miranda*. The detectives interrogating McNally explicitly demeaned the role of defense counsel when McNally invoked his right to an attorney. In each case, the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them. In each case, however, Plaintiffs' statements were ultimately used against them by prosecutors. These facts raise a genuine issue of material fact as to whether the detectives' questioning was coercive. . . .

Pet. App. B3-B4 (footnotes omitted). To demonstrate the evidentiary basis for the district court's determination

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[2] This ruling is not before this Court on this interlocutory appeal.

that there exists a triable issue of material fact, we briefly review each respondent's interrogation.

1. The interrogation of James McNally

Santa Monica police detectives interrogated respondent McNally for over an hour in an Arizona jail. Pet App. A6. He was advised of his *Miranda* rights before questioning turned to whether he would waive extradition and the degree of the crime that might be charged. *Id.* As set forth in the court of appeals decision, the tape transcript of the interrogation reveals that McNally attempted to assert his right to counsel and to remain silent no less than six separate times. *Id.* at A6-A11.[3] The two officers repeatedly responded to McNally's requests to see counsel by vigorously condemning defense attorneys, one officer stating at one juncture that he "[did]n't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either." *Id.* at A8. The interrogation proceeded as follows:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." [1] Let me talk to a California lawyer and we'll get back together.
>
> D1:[4] You'll what?

---

[3] The places where McNally asked to speak with an attorney and remain silent are noted by bracketed numbers in the quoted text below.

[4] D1 is petitioner Detective Cooper; D is petitioner Detective Talbot.

McNally: Okay. I'm saying, "I'll waive extradition. I'll go with 'you's" no hassle, no problem. . . .

D: Okay. Under, understand. . . .

McNally: So . . .

D: . . . understand what happens when you get to California – when you get your attorney. No attorney in his right mind is gonna' tell you to talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. [2] I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. [3] Let me just talk to him about a couple – you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . [4] let me talk to him a little bit and we'll get back – I promise I'll get back together with "you's."

D: So, you don't wanna' . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna tell us what happened . . .

McNally: [5] No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. [6] I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because – well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later is the same as what you're gonna tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This – what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape. . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . which is fine . . .

D: And it's – let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell – hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape than we stop the conversation and, and we'll go ahead. . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this. It's just the way I work. I know it's the way the District Attorney that I'm working with, uh, Richard Stone, works. We just – and if you were in our place, would you trust something

that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys. Man. We know that.

D: . . . I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this – we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just – I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's – this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . . " I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not trying to trick you here.
(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not – we're promising you, it's not gonna' be used against you – in the case in chief – against you, okay? Just, this is for our edification of what happened.

Id. at A6-A11.

At trial, McNally successfully moved to suppress his inculpatory statement as coerced and involuntary. *Id.* at A11. Notwithstanding that the two Santa Monica officers had assured respondent that any statement he gave is "not gonna' be used against you," the prosecutor used the statement at sentencing to argue that McNally's assertions of self-defense should be treated as an aggravating factor. *Id.*

2. The interrogation of James Johnson Bey

Los Angeles police interrogated Bey after he had been handcuffed to a bench at the police station for four hours. Pet. App. A11-A12. Bey was not given *Miranda* warnings until after the interrogating officers had begun

asking details regarding his case. ER 281-82.[5] Immediately after being advised of his *Miranda* rights, Bey stated that "I won't have another word to say until I have an attorney." *Id.* at A12. He repeated his request to speak with an attorney and to remain silent no less than five times. *Id.* at A12-A13.[6] The two officers questioning him, petitioners Bennett and Crosby, neither honored his request nor suspended their interrogation until Bey made statements. *Id.* Bey testified in his deposition that Bennett used physically threatening gestures, spoke in a loud and angry tone of voice, adopted a "sinister" and "condemning" tone, and at one point threatened the death penalty by saying, "We're going to drop the pill on you." *Id.* at A13-14; SER 75-80.[7] The transcript of the taped interrogation reads in pertinent part as follows:

> Bey: Am I being charged with murder? If I'm being charged with murder, then [1] I won't have another word to say until I have an attorney.
>
> D:[8] Is that – ah – your feelings? Do you – That's why I questioned you, do you wish to –

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[5] References to "ER" are to Defendants' Excerpts of Record, filed with the court of appeals.

[6] The places where Bey asked to speak with an attorney and remain silent are noted by bracketed numbers in the quoted text below.

[7] References to "SER" are to Plaintiffs' Supplemental Excerpts of Record, filed with the court of appeals.

[8] "D" is Detective Bennett; "U" is an unidentified detective, alleged to be Detective Crosby. Spaces marked as "***" were designated as unintelligible in the transcript.

Bey: * * * if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. [2] I won't say another word until I have an attorney.

D: Well, like you say yourself, James, you're a suspect.

Bey: Well, if I'm being charged with something, [3] I'd rather not have anything else to say until I have an attorney.

D: Okay?

Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use them in court.

U: I think James is familiar with out * * * outside Miranda. Are you familiar with that, James?

Bey: I don't – I don't know too much about the law. [4] I'm just telling you I know to keep my mouth shut * * * somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: * * *

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. [5] But I'm not gonna say nothing * * * an attorney * * *

D: Why don't you tell me what happened that night?

Pet. App. A12-A13.

At trial, Bey testified and the prosecution introduced his statement to impeach him. *Id.* at A14. On direct appeal, the California Court of Appeal, upon review of the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 21 Cal. App. 4th 1623, 1628, 27 Cal. Rptr. 2d 28, 31 (1993). The state appeals court characterized this as "a very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to [Bey] about the legal consequences of that violation." *Id.* It specifically remarked that petitioner Bennett had intentionally violated *Miranda* in order to impeach Bey's testimony, and that the tactic had been taught police at a training seminar:

> At trial, outside the presence of the jury, Detective Bennett testified that he had continued to question appellant "[s]o that if he did take the stand, his testimony could be impeached." Appellant's attorney asked: "Have you attended any seminars where it was suggested as a tactic to keep asking questions to a suspect after they invoke their rights?" Detective Bennett answered "Yes." He explained that the substance of what he was told at the seminar was:

> "In essence, you do want to get a statement for the expressed purpose that I just stated."

Id. at 1627. The state court of appeal nevertheless held the error to be harmless and affirmed Bey's conviction. *Id.* at 1629.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court has long held that evidence of *Miranda* violations is probative of actual police coercion.

As part of their evidence submitted in opposition to the petitioner officers' motion for summary judgment, respondents offered the undisputed tape transcripts of their custodial interrogations. These transcripts reveal police tactics deliberately designed to coerce inculpatory statements for use at trial. In each case, the coercion was effected in the same way: Two officers teamed up on one suspect and interrogated him "outside *Miranda*." Officers deceitfully promised, through the administration of *Miranda* rights, that each person possessed both a right to remain silent at any point during the interrogation and a right to consult with an attorney which, once asserted, would instantly terminate all police questioning. In fact, under the policy followed by the two police departments, this promise was false. Interrogating officers in both departments are affirmatively trained on how to extract information from suspects even after they have asserted their *Miranda* rights. Consistent with this training, petitioner officers continued to apply vigorous pressure to both suspects until statements were extracted, overwhelming McNally's and Bey's attempts to remain silent and to obtain the assistance of counsel.

To make matters worse, the petitioner officers coupled their already-coercive tactic with the false promise that, because the respondents had asserted their Fifth Amendment privilege, it was safe for them to speak. As both the federal district court and the court of appeals emphasized, state courts held in each case that the statements derived were involuntary and coerced. Pet App. A11, A14, B4. Respondents' wills were overborne by the ferocious pressure the officers applied, even after the suspects had asserted their Fifth Amendment rights.

In considering these tactics as part of the respondents' proof of coercion, the courts below broke no new ground. This Court held in *Miranda v. Arizona*, 384 U.S. 436 (1996), and has since reaffirmed numerous times, that the requirements of administration of *Miranda* warnings and, concomitantly, the requirement that "the exercise of those rights must be fully honored," derive directly from its "conclu[sion] that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.[9] *See also Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990). As then-Justice Rehnquist stated, "[t]he *Miranda* decision was based in large part on this Court's view that the warnings which it required police

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[9] *See also id.* at 469 ("[W]hatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.").

to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house." *New York v. Quarles*, 467 U.S. 649, 656 (1984) (citing *Miranda*, 384 U.S. at 455-58). Indeed, "[f]ailure to administer *Miranda* warnings creates a presumption of coercion." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). As the Court further explained in *Moran v. Burbine*, 475 U.S. 412 (1986):

> [T]he Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion.

Id. at 426 (citing *Quarles*, 467 U.S. at 656.).

While the violation of *Miranda*'s procedures creates a presumption of coercion, this Court has repeatedly held that compliance with *Miranda* is also probative of **actual** coercion. In *Davis v. North Carolina*, 384 U.S. 737 (1966), this Court ruled a confession involuntary under the Fourteenth Amendment, stating:

> [T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. *Haynes v. Washington*, 373 U.S. 503, 510-511 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 610 (1961); *Turner v. Pennsylvania*, 338 U.S. 62, 64 (1949). See also *Gallegos v. Colorado*, 370 U.S. 49, 54, 55 (1962). Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances

> described below which made his confessions involuntary.

Id. at 740-41. In *Withrow*, this Court expressly noted that courts look at the totality of circumstances to determine whether a confession was voluntary, and those circumstances "include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Withrow*, 507 U.S. at 693-94. These principles were applied in *Mincey v. Arizona*, 437 U.S. 385 (1978), where this Court found a statement to be involuntary based in part upon the fact that the accused's request for counsel was ignored. *Id.* at 399-401.

In this case, the evidence regarding petitioner officers' conduct easily supports the district court's determination that, at minimum, there is a genuine issue of material fact as to unconstitutional coercion. Far worse than no administration of the *Miranda* warnings at all, the police misconduct here twists *Miranda* itself into an instrument of coercion. During the interrogations of both respondents, the police officers had no sooner pronounced the rights of an in-custody suspect to remain silent and to speak with an attorney, when they proceeded to extinguish those rights. In these circumstances, the coercive power of the interrogating officer to deny a suspect's rights would appear absolute. Nothing the individual can say or do will end the interrogation, other than to make a statement that will satisfy the interrogating officers. A suspect's familiarity with *Miranda* only heightens the unconstitutional duress; the individual knows that a vital right is being denied to him, and therefore that he has little recourse but to make a statement. Thus, although this Court in *Miranda* has mandated

that "if a person in custody is to be subjected to interrogation, he **must** first be informed that he has the rights to remain silent" as "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere" (384 U.S. at 468, emphasis added), the unmistakable message communicated by deliberate police defiance of this directive is that not even the Supreme Court can control officers bent on having their way.

Nor are any new legal principles implicated by the use of evidence of the deliberate denial of requests for counsel as proof of unconstitutional coercion. In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court recognized that "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' " *Id.* at 485 (quoting *Miranda*, 384 U.S. at 474). As Chief Justice Rehnquist later explained the rationale for this rule:

> *Edwards v. Arizona* added a second layer of protection to the *Miranda* rules, holding that 'when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogations even if he has been advised of his rights.' *Edwards* thus established another prophylactic rule **designed to prevent police from badgering a defendant** into waiving his previously asserted *Miranda* rights.

Michigan v. Harvey, 494 U.S. 344, 350 (1990) (emphasis added, citations omitted). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990). As *Davis v. North Carolina, Withrow*, and

Mincey make clear, badgering in violation of *Miranda* and *Edwards* is a "significant factor" in assessing actual coercion.

Here again, the deliberate refusal by the police to honor repeated requests for counsel by individuals during custodial interrogation at a station house is probative of actual coercion, in violation of the Fifth Amendment. The dramatic and intentional eradication of the right by police reflects utter disregard of the individual suspect's will, not to mention the prophylaxis for the preservation of the right to be free from coercive interrogation. The officers' unauthorized and false assurances to the respondents, that because they invoked their rights it was safe for them to speak, transformed *Miranda* from a protective device into a powerful instrument used to overcome the suspects' explicitly stated desire to remain silent and speak with their attorneys.

That the courts below found the officers' egregious violations of *Miranda* to be probative of actual coercion does not mean, as petitioners assert (*see* Pet. 24-25), that the constitutional basis for this lawsuit is *Miranda*'s presumption of coercion. This case is about **actual** coercion, not just a violation of *Miranda*. While the circuits hold that there is no civil rights liability for technical *Miranda* violations where there is no credible evidence of actual coercion,[10] the circuits have long ruled that actual

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[10] *See Neighbour v. Covert*, 68 F.3d 1508, 1510 (2d Cir. 1995) ("failure to give *Miranda* warnings does not create liability under §1983"); *Lucero v. Gunter*, 17 F.3d 1347, 1351 (6th Cir. 1994) ("officer's failure to issue *Miranda* warnings cannot form the basis of a civil rights claim"); *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1437, 1442 (8th Cir. 1989) (remedy for failure to read Miranda warnings is exclusion, not a §1983 action); *Bennett v.*

coercion may be grounds for liability under 42 U.S.C. §1983.[11] Actual coercion has been alleged here and the district court found sufficient evidence to require this Fifth Amendment claim to go to the jury.[12] In finding the deliberate violations of *Miranda* to be probative of actual coercion, particularly when coupled with false promises, threatening gestures, and other coercive tactics, the courts below have simply adhered to settled law.[13]

Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) (mere failure to give *Miranda* warnings does not subject a police officer to liability under the Civil Rights Act); *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (failure to follow *Miranda* does not violate the Fifth Amendment and create a cause of action under §1983).

[11] *See Weaver v. Brenner*, 40 F.3d 527, 536 (7th Cir. 1994) ("if the confession is found as a fact to have been coerced, [this] violates [plaintiff's] constitutional rights and serves as a predicate for his §1983 action."); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) ("[t]here is no indication that physical violence need be present to produce the coercion . . . cognizable under §1983"); and *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) ("We also conclude that [plaintiff] has stated a constitutional claim arising from the . . . interrogation. Extracting an involuntary confession by coercion is a due process violation").

[12] The district court's ruling that the pretrial record establishes a genuine issue of material fact as to actual coercion may not be challenged in this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

[13] For the same reasons, the pendency of *Dickerson v. United States*, No. 99-5525, should have no effect on whether certiorari is granted in this case. At issue here is whether the courts below correctly concluded that officers' refusal to honor suspects' express requests to remain silent and to speak with their attorneys, among other factors, may be considered as evidence

2. The petition raises no novel or substantial issues regarding qualified immunity.

It is well-established doctrine that a government official is entitled to qualified immunity only when "performing discretionary functions" and where his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The constitutional right sought to be vindicated here – not to be subjected to coercive in-custody interrogations – has long been recognized by the Court, well before even *Miranda* itself. *See, e.g., Escobedo v. Illinois* 378 U.S. 478 (1964); *Spano v. New York*, 360 U.S. 315 (1959); *Leyra v. Denno*, 347 U.S. 556 (1954); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936). The petitioners have sought to avoid this difficulty by mischaracterizing this case as involving solely a technical *Miranda* violation and not actual coercion. But, as set forth above, that is a fair description of neither the rulings below nor of the pretrial evidence adduced in the district court.

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of unconstitutional coercion. As the ACLU has argued as amicus curiae in *Dickerson*, the *Miranda* decision was entirely consistent with the law that this Court had developed in prior cases to determine whether the Fifth Amendment's prohibition against compelled self-incrimination had been violated; by contrast, 18 U.S.C. §3501 represents a departure from the traditional Fifth Amendment test for compulsion. But regardless of how *Dickerson* is resolved, it will not affect this case – under any test for compelled self-incrimination, respondents have raised a triable issue of fact here.

Moreover, even as to the requirement of the *Miranda* warnings, this Court has held that the rule that "questioning must cease if the suspect asks for a lawyer provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Davis v. United States*, 512 U.S. at 461. As the Court stated in *Withrow*:

> We must remember . . . that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements. See *Quarles, supra*, [467 U.S.] at 663, (O'Connor, J., concurring in judgment in part and dissenting in part) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J. concurring in judgment)) (" 'meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures' ").

507 U.S. at 695 (citations omitted). *See also Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers) (*Miranda*'s " 'core virtue' " was " 'afford[ing] police and courts clear guidance on the manner in which to conduct a custodial investigation.' ") (bracket in original). Indeed, *Miranda* is perhaps the best known decision in the history of this Court, its "now familiar measures" phrased entirely in terms of what the police "must" say and what "rights must be afforded" to in-custody suspects during interrogation:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court

> of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement."

Withrow, 507 U.S. at 689-90 (quoting *Miranda*, 384 U.S. at 479).

Petitioners concede not only that the individual officers questioned respondents "outside *Miranda*,"[14] in order to obtain inculpatory statements, but also that the cities of Santa Monica and Los Angeles train their officers that they may do just that. *See* Pet. 5-6. Their remarkable argument that this training should immunize them from liability would eviscerate *Miranda*, turning its required warnings into discretionary pronouncements to be

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[14] The Santa Monica officers (Talbot and Cooper) claim that they question in violation of *Miranda* in very few cases. *See* Pet. 10. This claim is apparently based upon Talbot's declaration that he has questioned "outside *Miranda*" in fewer than 5% of all interrogations he has conducted. *See* Pet. App. G11. In this self-serving declaration, Talbot does not give the total number of interrogations he has conducted, nor does he indicate the number of interrogations in which a suspect has waived his or her rights. Talbot's declaration appears contrary to his own deposition testimony, where he could not recall how many times he questioned "outside *Miranda*" to gather intelligence or to obtain physical evidence. *See* SER 64-65. It also appears to undermine the parties' stipulation, in which Talbot's lawyer straightforwardly agreed that "Sergeant Cooper and Detective Talbot have questioned custodial suspects after they have asserted their *Miranda* rights." Pet. App. D4.

administered however and whenever individual officers so chose.[15] Of even more concern would be the broader message conveyed: that governmental entities could easily insulate their personnel from civil liability for violating clearly established rights recognized by any court, including this one, by simply training their agents to wilfully defy or disregard them.

For over sixty years, the law has been clearly established that officers may not coerce statements from suspects. *See Brown v. Mississippi*, 297 U.S. 278 (1936). If the issue raised in this case and addressed by the lower courts is correctly identified, it is readily apparent that the law on the subject is clearly established.

3. This case does not present an occasion to decide whether the Fifth Amendment may only be violated where coerced statements are used in court.

Respondents McNally and Bey have alleged violations of the Fifth Amendment, which guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The petitioner officers and their police trainer *amici*[16] belatedly argue that the Fifth

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[15] By comparison, in cases cited by petitioners, the *Miranda* violation was the result of "inadvertent disregard," not intentional violation (*Michigan v. Tucker*, 417 U.S. 433, 445 (1974)), or where there was "no claim that the statements made to the police were coerced or involuntary." *Harris v. New York*, 401 U.S. 222, 224 (1971).

[16] A brief was submitted for the State of California by Deputy Attorney General Joel Carey. Mr. Carey is a prominent law enforcement trainer on questioning "outside *Miranda*." *See*

Amendment right against self-incrimination may only be violated when coerced statements are used in court against them.[17]

This case is not the appropriate vehicle for resolving any arguable ambiguities in these authorities, since the coerced statements were not only intended to be used in criminal proceedings, but also **were in fact used** against both respondents in their criminal proceedings. Respondent Bey's statement was used against him at trial. He testified in his own defense and was cross-examined with his coerced statement. Pet. App. A14. Coerced statements may not be used for impeachment. *See New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979) (immunized testimony is inadmissible for impeachment). Further, under California law, statements admitted for impeachment are not limited to an assessment of credibility; rather, they are also evidence of the defendant's guilt. *See* Cal. Evid. Code

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Pet. App. E (reprinting Mr. Carey's own declaration and describing his training of police officers). A brief was submitted for the National Association of Police Organizations by Devallis Rutledge. Mr. Rutledge is also a prominent police trainer. *See* SER 127-33 (transcript of a training video featuring Mr. Rutledge). He was at one time a defendant in this lawsuit. Although his training may have influenced the defendant cities and the training of their officers, Mr. Rutledge was dismissed from the lawsuit because he did not participate in the interrogations or supervise the defendant officers. *See* ER 589-92.

In arguing that the Fifth Amendment does not apply in the station house, both Mr. Carey and Mr. Rutledge would seek to preserve their ability to train police officers on how to question suspects "outside *Miranda*" during a custodial interrogation.

[17] The petitioners made this argument in their reply brief in the court of appeals, but failed to make this argument in their opening brief.

§§1220, 1235. Thus, Bey's coerced statement was introduced into evidence in violation of the Fifth Amendment.

McNally's coerced statement was used by the prosecutor at sentencing to "to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police." Pet. App. A11. The question of whether the Fifth Amendment applies at a sentencing hearing was decided by this Court last term in *Mitchell v. United States*, 526 U.S. 314 (1999). In *Mitchell*, this Court stated: "The Fifth Amendment by its terms prevents a person from being 'compelled in any criminal case to be a witness against himself.' To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327 (citation omitted). Irrespective of whether the Fifth Amendment applies in the station house, it undoubtedly applies when a prosecutor uses a coerced statement against the defendant in court at sentencing. McNally's statement was thus also used in court in violation of the Fifth Amendment.

Because their coerced statements were actually used against both respondents in criminal proceedings, this is not an appropriate case for deciding whether the Fifth Amendment is violated only when there is in-court use of compelled testimony.[18] Petitioners' contention that this

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[18] Moreover, even if the facts somehow supported a grant of certiorari on this issue, it is difficult to understand what review would accomplish. In *Withrow*, this Court noted that eliminating *Miranda* violations from habeas corpus would not benefit federal courts because interrogation practices are still reviewed when actual coercion is claimed. *See Withrow*, 507 U.S. at 693-95. In the case at bench, the district court dismissed the respondents' Fourteenth Amendment cause of action because it

case provides a vehicle for resolving a split between the circuits is therefore incorrect. *See* Pet. at 22-23. It is certainly true, for example, that the Third Circuit in *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994), expressed doubts regarding the Ninth Circuit's *en banc* holding in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), that officers had violated clearly established Fifth Amendment rights by coercing incriminating statements from a suspect whose statements were never used at trial. In particular, the *Giuffre* court stated that *Cooper* "broke new ground" in upholding a §1983 claim based on the Fifth Amendment, "even though those statements were never used against the plaintiff in a court of law." 31 F.3d at 1256. While not expressly disagreeing with *Cooper*'s holding that such coercive police tactics could violate the Fifth Amendment, even if the statements were not used in court, *Giuffre* concluded that the law was not clearly established and therefore that the officers could avail themselves of qualified immunity.

This is not a proper case for resolving any arguable split, for the simple reason that the coerced statements in this case were both intended by interrogating officers to be used, and were in fact used by prosecutors, against the defendants in court. Thus, whatever test applies for determining both a substantive Fifth Amendment violation and qualified immunity, it is clearly satisfied here.

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was considered duplicative of the Fifth Amendment claim. If there is no Fifth Amendment cause of action here, the district court will be required to reverse its earlier ruling and permit the Fourteenth Amendment claim to proceed to trial.

Finally, even putting aside that the coerced statements of both respondents were used to their detriment in their criminal proceedings, petitioners' argument is contrary to *Miranda* and other holdings of this Court. *Miranda* was concerned with interrogation practices, not simply the admissibility of evidence: "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons is all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. Other decisions from this Court establish that the Fifth Amendment can be violated when statements or testimony is coerced, even if there is no criminal trial. *See Michigan v. Tucker*, 417 U.S. 433, 440 (1974) ("Although the constitutional language . . . might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited.").[19] The question whether coerced confessions obtained by officers at the station house can violate the Fifth Amendment is settled, and does not warrant revisitation by this Court.

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[19] *See also Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (finding that architects called before grand jury cannot lose the right to enter public contracts because of their exercise of the privilege, stating, "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."); *Gardner v. Broderick*, 392 U.S. 273 (1968) (police officer may not be discharged due to assertion of the Fifth Amendment privilege).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 24, 2000

Respectfully submitted,

CHARLES D. WEISSELBERG
MARK D. ROSENBAUM
Counsel of Record
DANIEL P. TOKAJI
MICHAEL SMALL
STEVEN R. SHAPIRO
SAM GROSS